

**STATE OF ILLINOIS**

**ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission	)	
on its own motion	)	
	)	Docket No. 01-0705
Northern Illinois Gas Company d/b/a NICOR	)	
Gas Company	)	
	)	
Reconciliation of Revenues collected under	)	
Gas Adjustment Charges with Actual Costs	)	
prudently incurred	)	
	)	
Illinois Commerce Commission	)	
on its own motion	)	
	)	Docket No. 02-0067
Northern Illinois Gas Company d/b/a NICOR	)	
Gas Company	)	
	)	
Proceeding to review Rider 4, Gas Cost, pursuant	)	
to Section 9-244(c) of the Public Utilities Act	)	
	)	
Illinois Commerce Commission	)	
on its own motion	)	
	)	Docket No. 02-0725
Northern Illinois Gas Company d/b/a NICOR	)	
Gas Company	)	
	)	
Reconciliation of Revenues collected under	)	
Gas Adjustment Charges with Actual Costs	)	
prudently incurred	)	

**VERIFIED MOTION TO COMPEL DISCOVERY  
FROM CITIZENS UTILITY BOARD**

Northern Illinois Gas Company d/b/a Nicor Gas Company (“Nicor Gas” or the “Company”), through its undersigned attorneys, hereby respectfully moves the Administrative Law Judges (the “ALJs”) pursuant to Section 200.370 of the Commission’s Rules of Practice, 83 Ill. Admin. Code § 200.370, for a ruling compelling the Citizens Utility Board (“CUB”) to respond to the Company’s First Set of Data Requests to CUB (the “CUB Data Requests”). CUB has not objected to this discovery but rather has declined to respond to the CUB Data Requests in a timely manner on the basis that CUB counsel is otherwise engaged. This discovery was served on CUB counsel two months ago, CUB’s responses to the

CUB Data Requests already are more than one month overdue. Nicor Gas's inability to obtain this discovery from CUB—which is the mirror image of extensive discovery by CUB on the Company—threatens the fundamental fairness of this proceeding. Therefore, Nicor Gas seeks expedited hearing on this Motion within (7) seven days of its filing to avoid material prejudice to the Company's ability to prepare its case for hearing and the possibility of further discovery-related procedural delays in this proceeding.

In support of this Motion, Nicor Gas states as follows:

1. On July 16, 2002, the Commission ordered that all the parties, including Nicor Gas, should proceed with discovery in this matter. Interim Order, p. 3, Docket No. 02-0067, Ill. Comm. Comm'n, July 16, 2003.

2. On August 21, 2003, Nicor Gas by electronic service served the CUB Data Requests on CUB counsel. The CUB Data Requests and transmittal correspondence from Nicor Gas's counsel are attached to this Motion as Exhibit A.<sup>1</sup>

3. The CUB Data Requests consist of 59 requests for documents and other information related to this proceeding. (*See* Ex. A). For purposes of this Motion, Nicor Gas has limited the CUB Data Requests on which it is seeking a ruling to the following thirty-eight (38) data requests: NG-CUB 1.01, NG-CUB 1.02 and 1.04, NG-CUB 1.05 and 1.07, NG-CUB 1.08 and 1.10, NG-CUB 1.11 and 1.13, NG-CUB 1.14 and 1.16, NG-CUB 1.17 and 1.19, NG-CUB 1.20 and 1.22, NG-CUB 1.23 and 1.25, NG-CUB 1.26 and 1.28, NG-CUB 1.29-1.37, NG-CUB 1.39-1.41, NG-CUB 1.42-1.44, and NG-CUB 1.56-1.59. As demonstrated below, these data requests are unquestionably relevant to the subject matter of this proceeding and merit a timely response.<sup>2</sup>

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<sup>1</sup> As indicated in the transmittal correspondence, Nicor Gas also served initial data requests on the Staff of the Commission and the Cook County State's Attorney's Office on the same date.

<sup>2</sup> Nicor Gas has limited this Motion in the interest of compromise and administrative efficiency. In doing so, Nicor Gas in no way waives any right to full and timely discovery from CUB with respect to the CUB Data Requests or any other discovery in this proceeding.

4. While described in greater detail below, the CUB Data Requests in general seek documents and information related to the Gas Cost Performance Program (the “GCPP”) previously operated by Nicor Gas and to Company’s annual purchased gas adjustment (“PGA”) cost reconciliation proceedings as they pertain to the GCPP. These areas of inquiry, in turn, mirror the subject matter of this proceeding on reopening. *See* Second Interim Order, p. 6, Docket No. 02-0067, Ill. Comm. Comm’n, December 17, 2003 (setting forth the scope of these proceedings on rehearing).

5. Much of the discovery sought amounts to no more than the request for documents in CUB’s possession—other than those already produced by Nicor Gas in this proceeding—related to transactions under the GCPP and/or the PGA that are referenced in the October 28, 2003 Report to the Special Committee of the Board of Directors of Nicor Inc. by independent counsel Scott R. Lassar (the “Lassar Report”). As the ALJs are aware, the Lassar Report was released to the parties upon publication last year and the transactions addressed in the Report have been the subject of extensive discovery on Nicor Gas, including by CUB.

6. The Company requested that CUB respond to the CUB Data Requests by September 4, 2003, or fourteen (14) days from the date of service, consistent with the general practice adopted by Nicor Gas in this proceeding to accelerate discovery, as possible. CUB provided no response to any of the CUB Data Requests by the September 4, 2003 date.

7. Nicor Gas counsel has spoken with CUB counsel on several occasions concerning the CUB Data Requests. CUB counsel initially stated that CUB would require additional time to provide its responses. Nicor Gas was agreeable to providing CUB with additional time within reason. On or about October 16, 2003, in a subsequent discussion with Nicor Gas counsel, CUB counsel stated that CUB would not respond to the CUB Data Requests for an indefinite period based on other pending matters unrelated to this proceeding requiring CUB counsel’s attention.<sup>3</sup> On October 17, 2003, CUB counsel by

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<sup>3</sup> Nicor Gas respectfully notes that CUB counsel’s other time commitments did not prevent CUB from filing in the past week in this proceeding an eighteen (18) page “Reply to Nicor [Gas]’s Additional Support for Documents Withheld from Production” (although the ALJs had not set a briefing schedule for or requested any such filing), as well as additional discovery on Nicor Gas.

letter confirmed this position adding that, in CUB counsel's view, CUB's obligation to respond to this discovery in a timely manner is "completely voluntary." (See Rob Kelter Letter to John Rooney, October 17, 2003, attached hereto as Ex. B). As of the filing of this Motion, Nicor Gas has received no discovery whatsoever responsive to the CUB Data Requests, despite consultation and reasonable attempts to resolve its differences with CUB. See 83 Ill. Admin. Code § 200.350.

8. CUB's refusal to respond to the CUB Data Requests is fundamentally unfair, wholly unsupported by law, and, if not modified, highly prejudicial to the Company which, like any other party, should have the chance to educate itself in discovery as to all relevant and material facts to this proceeding. See 83 Ill. Admin. Code § 200.340. The ALJs should not endorse CUB's attempt to avoid its obligations to respond to discovery in a timely manner.

9. In effect, CUB seeks to impose a double-standard for discovery in this proceeding. Since discovery resumed last year (see ¶ 1 *supra*), Nicor Gas has responded to unprecedented discovery in both amount and kind. CUB alone has served no fewer than thirteen (13) sets of data requests on Nicor Gas, consisting of dozens of questions and document requests. Nicor Gas also has responded to written discovery from Staff, the Cook County State's Attorney's Office, and the Illinois Attorney General's Office, and CUB has been the beneficiary of such discovery. In total, Nicor Gas has produced approximately 115,000 pages of documents to CUB and the other parties since discovery resumed.<sup>4</sup> Nicor Gas further agreed to and facilitated the depositions of thirteen (13) current and former Company employees, including all managers and senior executives with responsibility for the GCPP, and CUB as a party participated in all these depositions.

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<sup>4</sup> Additionally, some 8,000 pages of documents have been produced to the parties by Mr. Lassar and/or by his consultant KPMG LLP related to Mr. Lassar's investigation including, without waiver, certain of Mr. Lassar's work product in his capacity as attorney to the Special Committee of the Board of Directors of Nicor Inc.

10. Given the enormous burden in discovery shouldered by Nicor Gas, CUB should not be allowed to reciprocate by summarily declining to cooperate in discovery.<sup>5</sup> The Commission's Rules neither contemplate nor permit such unilateral conduct in discovery by any party. *See* 83 Ill. Admin. Code § 220.340 (discovery in Commission proceeding is intended to obtain full disclosure of all relevant and material facts and to proceed on an informal and cooperative basis); 83 Ill. Admin. Code 200.410 (discovery responses due within twenty-eight (28) days, absent agreement among the parties or ruling by the ALJs); *see, e.g., Williams v. A. E. Staley Mfg. Co.*, 83 Ill. 2d 559, 564-66, 416 N.E.2d 252, 255-56 (1981) (parties are encouraged to use discovery process to illuminate actual issues in a case, not to obstruct or harass opposing parties).

11. Further, the discovery propounded by Nicor Gas on CUB is undisputedly relevant and requires a timely response to preserve the integrity of the pre-hearing process in this matter. Of the thirty-eight data requests that are subject to this Motion:

- Eighteen (18) seek CUB's documents—other than those already produced by Nicor Gas—related to specific transactions and issues referenced in the Lassar Report. (*See* Ex. A, at NG-CUB 1.02 and 1.04, NG-CUB 1.05 and 1.07, NG-CUB 1.08 and 1.10, NG-CUB 1.11 and 1.13, NG-CUB 1.14 and 1.16, NG-CUB 1.17 and 1.19, NG-CUB 1.20 and 1.22, NG-CUB 1.23 and 1.25, NG-CUB 1.26 and 1.28). CUB has conceded the relevance of this discovery by serving discovery of its own directed at the Lassar Report (*see, e.g.,* CUB's 11<sup>th</sup> Set of Data Requests, attached hereto as Ex. C) and conducting extensive oral discovery into this subject matter during depositions.
- Nine (9) seek CUB's documents and other information related to the Company's use of the "last-in, first-out" ("LIFO") accounting for gas in storage inventory under the GCPP, including CUB's knowledge of the same. (*See* Ex. A., at NG-CUB 1.29-1.37). CUB has conducted extensive discovery into the use of LIFO accounting under the GCPP and the Company's disclosure or alleged non-disclosure of such information. (For the ALJs' convenience, Nicor Gas has attached to this Motion, as Exhibit D, excerpts from CUB counsel's examination of certain Nicor employees on this subject matter.) Nicor should be allowed to investigate all the facts as they pertain to this line of discovery. CUB has opened the door to this inquiry.

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<sup>5</sup> Nicor Gas respectfully notes that, in its view, much of the voluminous discovery to which it has been subject over the past year is irrelevant and/or immaterial to the issues actually presented for resolution in this proceeding. *See* Second Interim Order, p. 6; 220 ILCS 5/9-244 (the statutory provision regulating the GCPP); *see generally* Article IX of the Public Utilities Act, 220 ILCS 5/9-101 *et seq.* Nonetheless, the Company in good faith and at great time and expense (and without waiver) has cooperated fully with CUB and other parties in discovery.

- Six (6) seek CUB's documents and other information concerning two (2) specifically identified Company filings with the Commission to which CUB had access related to the GCPP during the time periods relevant to this proceeding. (*See* Ex. A, at NG-CUB 1.39-1.41, NG-CUB 1.42-1.44). Each of filings provides information about the Company's operation of the GCPP, and the Company is entitled to discover which CUB employees received these filings and what review and analysis CUB has conducted on them. Such discovery is customary and proper in Commission proceedings and entirely consistent with the Commission's "full disclosure" policy on discovery. *See* 83 Ill. Admin. Code § 340.
- Four (4) seek CUB and CUB counsel's communications with plaintiffs' counsel in two pending civil actions, which are based upon the same factual matters addressed in this proceeding, and associated documentation. (*See* Ex. A, at NG-ICC 1.56-1.59). CUB counsel has not asserted any privilege or other protection of non-disclosure related to these requests, and CUB should be required to provide the discovery sought, which is reasonably calculated to lead to the discovery of admissible information and is discoverable under the Commission's Rules. *See* 83 Ill. Admin. Code § 340.
- Finally, one (1) seeks the identity of CUB personnel who reviewed or analyzed Nicor Gas documents related to the Company's 1999-2001 PGA reconciliation proceedings. (*See* Ex. B, at NG-CUB 1.01). The Commission specifically has identified the operation of the Company's PGA for these time periods as within the scope of these proceedings on reopening. *See* Second Interim Order, p. 6. Such information is reasonably calculated to lead to the discovery of admissible information and is discoverable under the Commission's Rules. *See* 83 Ill. Admin. Code § 340.

12. CUB counsel's busy schedule, with all due respect, is no proper basis for the refusal to respond to discovery in a timely manner under the circumstances presented. In the event CUB were allowed to persist in this conduct, Nicor Gas would be materially prejudiced in its ability to prepare its case for hearing. CUB already has withheld its responses to this discovery for more than one (1) month. Given the time constraints facing all the parties to this proceeding, including Nicor Gas—and the pressing need to move this matter to hearing without further procedural delay—CUB should not be allowed to deny the Company's access to discovery until such time as may suit its convenience or advantage.<sup>6</sup>

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<sup>6</sup> Nicor Gas notes that CUB's direct testimony, and that of Staff and the other party-intervenors, is due on November 21, 2003. After that date, Nicor Gas will have only eight (8) weeks, which includes Thanksgiving and the year-end holiday season, in which to prepare its rebuttal case.

WHEREFORE, for all these reasons, Nicor Gas respectfully requests a ruling requiring CUB to respond to the CUB Data Requests, as limited by this Motion, no later than seven (7) days from the date of the ALJs' ruling and such other relief as is just and appropriate. Nicor Gas further seeks expedited briefing on this Motion with a hearing to take place, if possible within the ALJs' schedule, no later than Monday, October 27, 2003.

Dated: October 20, 2003

Respectfully submitted,

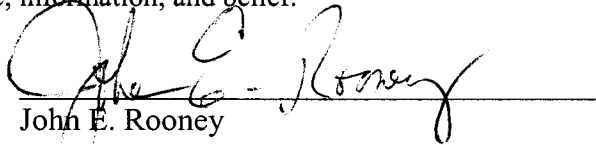
NORTHERN ILLINOIS GAS COMPANY  
D/BA/ NICOR GAS COMPANY

By: \_\_\_\_\_  
One of its attorneys

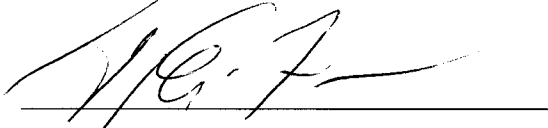
John E. Rooney  
Thomas A. Andreoli  
Sonnenschein Nath & Rosenthal  
233 South Wacker Drive  
Chicago, Illinois 60606  
(312) 876-8000  
jrooney@sonnenschein.com  
tandreoli@sonnenschein.com

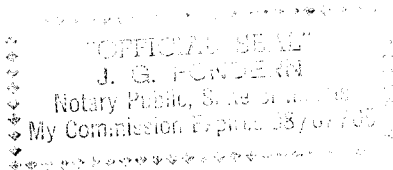
**VERIFICATION**

I, John E. Rooney, being first duly sworn, depose and state that I am an attorney at Sonnenschein Nath & Rosenthal LLP and one of the attorneys for Northern Illinois Gas Company d/b/a Nicor Gas in Consol. Docket Nos. 01-0705, 02-0067, 02-0725, that I have read Nicor Gas's Motion to Compel Discovery from Citizens Utility Board and know the contents thereof, and that the statements contained therein are true and correct to the best of my knowledge, information, and belief.

  
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John E. Rooney

Subscribed and sworn to before me  
this 20<sup>th</sup> day of October 2003

  
\_\_\_\_\_  
Notary Public





**CERTIFICATE OF SERVICE**

I, Thomas A. Andreoli, hereby certify that I served a copy of Northern Illinois Gas Company d/b/a Nicor Gas's Motion to Compel Discovery from CUB Of the Illinois Commerce Commission upon the service list in consolidated Docket Nos. 01-0705/02-0067/02-0725 by email on October 20, 2003.

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Thomas A. Andreoli